

ESTTA Tracking number: **ESTTA560622**

Filing date: **09/20/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055426
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Attachments	Registrant's Trial Brief Redacted.pdf(477874 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of:

Run It Consulting, LLC,

Petitioner,

vs.

Leander Lodi, by Assignment from
Augusto Lodi dba American Muscle,

Registrant.

Cancellation No. 92055426

U.S. Trademark Registration No. 1,962,898

Mark: AMERICAN MUSCLE

Registered on Principal Register: 3/19/1996

Trademark Trial and Appeal Board
Commissioner for Trademarks
Via E-File

REGISTRANT'S TRIAL BRIEF
REDACTED

COMES NOW Registrant, LEANDER LODI, by Assignment from Augusto Lodi dba American Muscle, (hereinafter "Registrant"), and submits the following Trial Brief in the above-entitled matter:

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1. INTRODUCTION

LEANDER LODI ("Registrant") is the owner of United States Trademark Registration No. 1,962,898 for the mark AMERICAN MUSCLE for use on various goods, including, vitamin supplements, sportswear, and weightlifting accessories. RUN IT CONSULTING, LLC ("Petitioner") has filed a Petition for Cancellation of Registrant's AMERICAN MUSCLE trademark registration on the sole basis that Registrant has allegedly abandoned the same. Registrant denies that he has abandoned the AMERICAN MUSCLE registration. Registrant does not dispute Petitioner's standing in this proceeding.

A cancellation petitioner must show that there is a valid ground that nullifies the registrant's right to registration. In the instant petition, Petitioner asserts abandonment as its only grounds for cancelling Registrant's AMERICAN MUSCLE registration. Petitioner bears the burden of proving abandonment by a preponderance of the evidence. Petitioner has not met that burden.

2. SUMMARY OF THE ARGUMENTS

In its own Trial Brief, Petitioner argues that it has presented proof of non-use of the AMERICAN MUSCLE mark by Registrant for a period of at least three consecutive years – specifically, between 1998 and 2004. Registrant disputes the existence of any period of alleged non-use, whether between the years 1998-2004, in the three years immediately preceding the filing of the instant petition, or at any other time during the existence of the subject registration. Petitioner's allegation is not based on any identifiable evidence of non-use, but is instead based solely upon the fact that Registrant did not produce any documents evidencing sales prior to 2005 – a period of time more than seven years before the instant petition was filed.

Assuming for the sake of argument that Petitioner was able to establish non-use of the AMERICAN MUSCLE mark between 1998 and 2004, Registrant has rebutted any possible presumption of abandonment by presenting evidence of use subsequent to the alleged period of non-use. Specifically, Registrant has provided sales records covering 2006¹ through 2012,² demonstrating continuous and ongoing use of the AMERICAN MUSCLE mark in interstate commerce for at least the six years immediately preceding the filing of the instant petition for cancellation.

Since Petitioner has not demonstrated any effective period of non-use, it has not met its burden of proof to show abandonment of the subject AMERICAN MUSCLE registration. Even if the Board accepted Petitioner's position on the alleged period of non-use, Registrant has effectively rebutted any presumption of intent not to resume use by presenting uncontroverted evidence of sales for at least the last six years preceding the filing of the petition for cancellation.

3. DESCRIPTION OF THE RECORD

The record before the Board includes the testimonial depositions of two witnesses, two notices of reliance, the registration at issue, and the file wrapper of the registration at issue, as set forth below:

Trial Testimony

Markus Trillsch, Principal at Run It Consulting, LLC, taken March 7, 2013 and Exhibits.

Leander Lodi, Registrant, taken May 7, 2013 and Exhibits.

¹ One of Registrant's invoices is dated in 2005, but it was suggested during Registrant's testimony deposition that the 2005 date was probably a typographical error and should have been 2007. (Deposition of Leander Lodi, dated May 7, 2013 (hereinafter Lodi Depo) at 88:4-90:18)

² Registrant's discovery responses and document production were provided in 2012. Petitioner did not propound any follow-up discovery requests or seek supplementation. Discovery closed in December 2012.

Notices of Reliance

Petitioner's Notice of Reliance – Confidential, filed March 8, 2013.

Petitioner's Notice of Reliance – filed March 8, 2013.

Registration and File Wrapper

U.S. Registration No. 1,962,898.

4. STATEMENT OF THE FACTS

Registrant is the owner of United States Trademark Registration No. 1,962,898 for the mark AMERICAN MUSCLE for use on various goods, including, vitamin supplements in International Class 5. The AMERICAN MUSCLE mark was registered on the Principal Register on March 19, 1996, claiming a date of first use in commerce of May 28, 1987. (Lodi Depo, 5:19-8:13; Exhibit A-U.S. Reg. No. 1,962,898)

Registrant has continuously sold goods bearing the AMERICAN MUSCLE mark from his first use in 1987 to the present. (Lodi Depo, 19:11-25) There has never been any period of time, whether three consecutive years or any other duration, that Registrant has not sold goods bearing the AMERICAN MUSCLE mark. In addition, Registrant has never intended to not continue using the AMERICAN MUSCLE mark. (Lodi Depo, 20:1-8)

From the first use in commerce, Registrant's business grew rapidly such that by the early to mid-1990s he was averaging between \$40,000 and \$60,000 in sales per month. Registrant's goods bearing the AMERICAN MUSCLE mark were sold primarily in gyms across the United States, as well as, internationally. Registrant also sold products to GNC stores and through kiosks in malls. (Lodi Depo, 10:8-11:8)

In the mid to late 90s, Registrant's business experienced some bad publicity that resulted in

a significant drop in sales.³ The bad publicity resulted from a manufacturer, without Registrant's knowledge, supplying a product other than as described on Registrant's label. One of Registrant's competitors, in partnership with an industry magazine, tested the product and published the results. Registrant allowed customers to keep the mislabeled product and over six to eight months replaced the mislabeled product with the intended product – all free of charge. Registrant also sought to reverse the bad publicity but did not meet with success. (Lodi Depo, 12:24-15:6)

In 1999, after replacing the mislabeled product, Registrant was forced to change his business model to stay in business. He started dealing with select distributors with the idea of turning things around. These distributors included Magic Kayhan in Virginia and Ed Holmes in California, both of whom he still purchase products from Registrant. Over the years, Registrant has also sold to Ray Land in Arizona and Richard Coote in Canada. Registrant understands that Mr. Kayhan exports at least a portion of the products that he buys from Registrant to Iran. (Lodi Depo, 15:15-17:5, 42:10-44:14, 47:24-48:19, 48:23-49:20, 52:9-53:10, 54:14-20, 74:10-75:16, 90:20-91:6)

The goods that Registrant was selling in 1999, included existing inventory of the full line of products that he had been offering from the beginning. He stopped ordering replacement inventory on most products except Creatine Monohydrate, protein powder, weightlifting straps, and clothing, for which he continued to order replacement inventory. As existing inventory would run out on a particular product, Registrant would stop offering it. Registrant's sales continued under this new business model for every year from 1999 to the present. (Lodi Depo,

³ While Registrant may have used the word "killed" during his testimony deposition, such was clearly a non-literal usage of the word. Petitioner repeatedly references how Registrant admitted that the bad publicity "killed" his business. The entirety of Registrant's testimony clearly demonstrates that his business continued after the bad publicity.

7:6-18: 23, 45:3-23)

The change in Registrant's business model also necessitated a change in how the business was run. At the peak, Registrant employed a staff of about twelve sales reps. After the sales dropped off, Registrant let his sales force go until it was just himself with some family and friends. (Lodi Depo, 37: 22-39:17, 46:22-47:13) Registrant also moved the business from his warehouse location into his residence. (Lodi Depo, 35:25-37:13) Finally he eliminated two outdated "pin"-type printers that used expensive, preprinted, triplicate forms for invoices in favor of less expensive, computer-generated invoices. (Lodi Depo, 46:9-15, 84:17-85:14)

Consistent with requirements of the Trademark Act, Registrant allowed certain registrations to lapse for logos or goods/services that he was no longer using or offering.⁴ However, Registrant was still using the words AMERICAN MUSCLE, so in 2006 he renewed the registration that is the subject of this petition. (Lodi Depo, 21:10-13, 24:3-25:21; Exhibit C thereto; U.S. Registration No. 1,962,898 File Wrapper, §§ 8 and 9 Declaration, March 13, 2006) Petitioner suggests that Registrant's decision to not renew the other registrations is evidence of his abandonment of the registration that is the subject to the instant petition. Registrant should not be penalized for complying with applicable statutes and regulations regarding marks that he is no longer using.

In more recent times, Registrant has been making other changes to his business. In 2010-11, Registrant redesigned the label for his products. The purpose for the redesign was, in part, to get a new look and because he was running out of inventory on the old labels. Registrant also wanted a new label to go with a new product that he is formulating and his plans to expand the

⁴ Specifically, Registrant did not renew registrations for a tan accelerator and for a television show because he was no longer offering those goods/services. Registrant also did not renew any registrations that were for a logo of "a triangle with a flexed arm" as he was no longer using that logo. (Lodi Depo, 20:9-21:18)

business again. (Lodi Depo, 50:25-51:14; Exhibits D, E and F) In 2012, Registrant also registered a domain name and created a website for his goods sold under the AMERICAN MUSCLE mark. (Lodi Depo, 65:7-66:12)

5. **LEGAL ARGUMENT**

Section 45 of the Trademark Act, 15 USC §1127, defines "abandonment" of a mark, in pertinent part, as follows:

When [a mark's] use has been discontinued with intent not to resume such use ... intent not to resume may be inferred from circumstances ... non-use for three consecutive years shall be prima facie evidence of abandonment ... "use" of a mark means the bona fide use of such mark made in the ordinary course of trade and not made merely to reserve a right in a mark.

Use in commerce contemplates "commercial use of the type common to the particular industry in question". Paramount Pictures Corp. v. White, 31 USPQ 2d 1768, 1774 (TTAB 1994). The Legislative History of the Trademark Law Revision Act of 1988, Public Law 100-667, states that:

The definition [of "use in commerce"] should be interpreted with flexibility so as to encompass various genuine, but less traditional, trademark **uses** such as those made **"to preserve ownership rights in a mark if, absent an intent to abandon, use of a mark is interrupted due to special circumstances."** (emphasis added)

Automedx, Inc. v. Artivent Corp., 95 USPQ 2d 1976, 1981 (TTAB 2010) (quoting S. Rep.

No. 100-515, pgs. 44-45, September 15, 1988). However, the practice of token use, i.e., reserving a mark through making, for example a single shipment, was eliminated as a basis for registration by the Trademark Law Revision Act of 1988. Thus, although token use may not create or maintain trademark rights, reduced but ongoing sales in the ordinary course of trade is sufficient to preserve ownership rights in a mark, especially in the absence of intent to abandon.

Because a trademark owner's Certificate of Registration is "prima facie evidence of the validity of the registration" and continued use of the registered mark, the burden of proof for cancellation is placed upon those who seek cancellation. Cerveceria Centro Americana S.A. v. Cerveceria India, Inc., 892 F.2d 1021, 13 USPQ 2d 1307, 1309 (Fed.Cir. 1989). In order to prove abandonment, a petitioner must show non-use of the mark and intent not to resume use. However, because of the difficulty in proving the second element, a party seeking cancellation may rely on the statutory presumption that three years of non-use is evidence of abandonment. *Id.* If three years of non-use is shown, such statutory presumption shifts the burden to the registrant to produce evidence of use or of intent to resume use. Rivard v. Linville, 133 F.3d 1446, 1449, 45 USPQ.2d 1374 (Fed Cir 1998). However, the burden of persuasion is always on the petitioner to prove abandonment by a preponderance of the evidence. *Id.*

A. Registrant's Continuous and On-going Use

As established by the subject registration and the trial testimony of Leander Lodi, Registrant first used the AMERICAN MUSCLE mark in commerce in May 1987. (Lodi Depo, p 5, ln 19 thru p 8, line 13; U.S. Reg. No. 1,962,898) Registrant has also presented evidence, in the form of both testimony and documents, that the AMERICAN MUSCLE mark has been used continuously from such first use to the present. (Lodi Depo, 19:11-25; Exhibits G thru P) Based

upon Petitioner's Trial Brief, it apparently does not dispute Registrant's date of first use in commerce and use through at least 1998 – a period for which Registrant similarly did not provide documented proof of sales.

Concerning the period from 1998 through 2004, Registrant admittedly provided only the testimony of Leander Lodi as evidence of use. Petitioner dismisses this testimony as having little weight since they are “self-serving proclamations”, citing to Rivard v. Linville, 133 F.3d 1446, 1449 (Fed. Cir. 1998)(concerning proclamations regarding intent to resume use rather than existence of actual use); citing Imperial Tobacco v. Phillip Morris, 899 F.2d 1575, 1581 (Fed Cir 1990) (where the issue of such statements was raised in the context of a summary judgment motion). The instant case is distinguished from Rivard because the registrant in Rivard had admitted to never using the subject mark in U.S. commerce and provided only proclamations of his intent to commence use. This admission of non-use was sufficient for the petitioner in Rivard to meet its initial burden to establish non-use. In the instant case, Registrant has never made any such admission of non-use and, in fact, maintains the existence of continuous and on-going use.

Petitioner has no such admission of non-use upon which to rely to meet its burden. Petitioner has no evidence to establish non-use. Instead, Petitioner asserts that Registrant's failure to produce sales invoices from a period of time more than six (6) years before the filing of the instant petition establishes a period of non-use.

Specifically, Petitioner asserts that Registrant's failure to produce sales records covering the period 1998-2004 establishes that as a six year period of non-use. The time periods in Rivard involved only the five (5) years immediately preceding the filing of the petition for cancellation. To further contrast Rivard, Petitioner's argument in the instant case centers around an alleged

period of non-use between eight (8) and fourteen (14) years before the filing of the petition for cancellation. As testified to by Mr. Lodi, he does not retain his records from that long ago.

Mr. Lodi testified that when he moved office spaces in 1998, he “threw a lot of things away”, including boxes of old invoices. He also testified that his accountant told him he only needed to retain records for three (3) years and that he could get rid of anything older than three (3) years.⁵ Petitioner’s brief treats this fact as being the single instance when Registrant would have discarded old records. If that were the case, when Registrant discarded records in 1998, he would have retained records as far back as 1995 – three (3) years before the office move. However, it is a reasonable inference that in the intervening fourteen (14) years, Registrant would have discarded additional records using the same three (3) year guideline suggested by his accountant.

It is not reasonable to expect Registrant to have maintained and have available sales records covering all of the 25-plus years during which Registrant has used the AMERICAN MUSCLE mark.⁶ It is much more reasonable for Registrant to have maintained only those most recent records consistent with the advice of his accountant. Whether Registrant maintained older records is a moot point because Petitioner’s alleged period of non-use (1998-2004) is still at least seven (7) years before Petitioner’s alleged date of first use. Even assuming that Registrant was not using the AMERICAN MUSCLE mark between 1998 and 2004, his use since 2006 is sufficient to rebut any presumption of an intent not to resume use.

B. Quantum of Registrant’s Use from 2006 to the Present

Registrant’s documented use in the intervening years from 2006 to the present sufficiently establishes continuous on-going use or, assuming that the Board accepts Petitioner’s allegation of

⁵ Mr. Lodi explained that the 1997 and 1998 invoices produced in this case were found in an old file cabinet and he believed that they had been thrown away. He did not know why they did not get thrown away. (Lodi Depo, 36:6-12)

⁶ Registrant notes that Petitioner does not make a similar argument for the period from 1987 to 1997, for which invoices were also not produced.

at least three consecutive years of non-use, rebuts any presumption of an intent not to resume use.

Registrant's sales records from 2006 to 2012, in conjunction with his trial testimony, establish bona fide use of the AMERICAN MUSCLE mark in the ordinary course of trade. These records and Registrant's testimony establishes such use in interstate commerce. Registrant is based in California. Registrant's distributors are located in California, Virginia, Arizona, and Canada. That alone is sufficient to establish sales in interstate commerce.⁷ These distributors re-sell Registrant's goods to customers in their states or countries of residence. In addition, Registrant has knowledge that one of his distributors exports some of the products to Iran. (Lodi Depo, 42:10-44:14, 47:24-48:19, 48:23-49:20, 52:9-53:10, 54:14-20, 74:10-75:16, 90:20-91:6)⁸

Registrant's invoices from 2006 thru 2012 include the following sales figures:

Year	# of Units	Amount
2006		
2007 ⁹		
2008		
2009		
2010		
2011		
2012		
TOTAL:		

(Lodi Depo, Exhibits H thru O)

7 It is immaterial that Registrant's distributors may take possession of the goods in California. The business transaction between Registrant and his out-of-state distributors are of the type that can lawfully be regulated by Congress. TMEP §901.03 Even if the goods are picked-up in California, Registrant's distributors are residents of other states or countries, take those goods back to their states or countries of residence, and resell the goods. In addition, Registrant testified that when the goods are not picked-up or delivered in California, he ships the goods by USPS or third-party carrier. (Lodi Depo, 74:10-75:16, 81:15-82:10, 95:24-96:15)

8 These sales by Registrant establish use in interstate commerce. Over twenty of the sales between 2006 and the present were to Magic Kayhan – a customer based in Purcellville, Virginia. Despite the fact that Mr. Kayhan or his drivers picked-up the goods from Registrant in California, those goods were purchased by a Virginia resident and were re-sold by Mr. Kayhan in Virginia, as well as, exported to Iran. (Lodi Depo, 90:20-91:6)

9 Registrant has tabulated the numbers for 2007 to include the amounts from Invoice #12299 (Exhibit H), which Registrant submits contains a typographical error in the date and should be dated "9/18/2007" (Lodi Depo, 88:4-90:18) Petitioner argues that this typographical error is proof that the invoices are fabricated. A single typographical error in over 75 invoices is hardly evidence of fabrication. It is worth noting here that Petitioner's Trial Brief contains a similar typographical error in referencing the date of Petitioner's Notice of Reliance as "03/08/2012". (Petitioner's Trial Brief, p 2)

These documented sales records establish a pattern of transactions covering at least the seven (7) years preceding the filing of the instant petition for cancellation. Over those seven (7) years, Registrant sold [REDACTED]

The number of transactions, units and revenue generated is clearly evidence of sales in the ordinary course of trade and not transactions merely to reserve trademark rights. This is not a case where the registrant has had one or two sales. Between 2006 and 2012, Registrant has had seventy-six documented transactions. (Lodi Depo, Exhibits H thru O)

In addition, Registrant's sales are regular and consequential – they are not *de minimis*. Sales that are termed *de minimis* are usually those that are “small, sporadic and inconsequential”. Examples of such *de minimis* sales include:

- Chandon Champagne Corp v. San Marino Wine Corp., 335 F.2d 531, 534, 142 USPQ 239 (2d Cir 1964) (pre-war sale – over twenty years before – of a few hundred cases of Dom Perignon insufficient to reserve trademark rights);
- Momentum Luggage & Leisure Bags v. Jansport, Inc., 64 USPQ.2d 1795 (2d Cir. 2002) (single sale of eight pieces of luggage for \$760 in two years insufficient to prove use);
- Major League Baseball Properties, Inc. v. Opening Day Productions, Inc., 385 F.Supp.2d 256, 74 USPQ.2d 1102 (S.D. N.Y. 2005) (sale of fifty shirts for \$300 insufficient use);
- Gameologist Group, LLC v. Scientific Games Intern., Inc., 838 F.Supp.2d 141 (S.D. N.Y. 2011) (sale of four board games for \$30 each was insufficient use);

- Smith v. Ames Dept. Stores, Inc., 988 F.Supp. 827, 839 (D.N.Y. 1997) (sale of 552 shirts and 324 hats not sufficient use);
- Zazu Designs v. L’Oreal, S.A., 979 F.2d 499, 24 USPQ.2d 1828, 1832 (7th Cir. 1992) (sale of a few bottles of shampoo insufficient use).

Registrant’s sales over the last seven years totaling [REDACTED]

[REDACTED] are clearly distinguishable from these instances of *de minimis* sales.

The quantum of use sufficient to establish trademark rights does not require a minimum number, but rather sales in the ordinary course of trade. 15 USC § 1127 Registrant’s documented sales from 2006 to the present meet this statutory requirement.

Furthermore, during the passage of the Trademark Law Revision Act of 1988 (Public Law 100-667), the legislature contemplated other examples of use in commerce that were “less traditional”, such as those to preserve a trademark where “use of a mark is [diminished] due to special circumstances” without an intent to abandon the same. See also, Automedx, 95 USPQ 2d at 1981 (TTAB 2010) [Supra, p. 6]. Based upon the bad publicity generated by Registrant’s competitor in 1998, i.e., a “special circumstance”, this is clearly a situation where Registrant’s diminished sales are sufficient to satisfy the use in commerce requirement.

C. Petitioner’s Lack of Evidence

Petitioner seeks to cancel Registrant's AMERICAN MUSCLE registration on the basis that Registrant has allegedly abandoned the same. Petitioner’s initial rationale for asserting that Registrant had abandoned the AMERICAN MUSCLE mark was because Markus Trillsch, one of Petitioner’s Principals, could not “find any proof that this mark currently existed.” (Deposition of Markus Trillsch, dated March 7, 2013 (hereinafter Trillsch Depo), 11:22-25)

According to his own testimony, Mr. Trillsch's investigation consisted of "several searches", "online forums", "Google searches", "hours of research and looking through every single web page on Google", and "looking at different forums like Bodybuilding.com". (Trillsch Depo, 11:16-21) Under cross-examination, Mr. Trillsch confirmed that he spent "several hours" searching websites and forums – Google, Yahoo, Bing, Bodybuilding.com, and Anabolic Minds – for Registrant's goods. Various search terms included American Muscle supplements, American Muscle vitamins, American Muscle products, etc. (Trillsch Depo, 24:14-27:17)

Other than the several hours of Internet searches to which he testified, Mr. Trillsch did not conduct any other searches, did not hire a private investigator, and did not take any other similar actions to find Registrant's AMERICAN MUSCLE products. (Trillsch Depo, 27:18-28:17)

Petitioner has no evidence to support its allegation that Registrant stopped using his AMERICAN MUSCLE mark other than Mr. Trillish's testimony about his "several hours" of Internet searching. (Trillsch Depo, 28:18-29:3)

Several hours of internet searching can hardly be considered an exhaustive search to prove the absence of any use of the AMERICAN MUSCLE mark by Registrant. A witnesses' testimony about such Internet searches, especially without more carries very little weight regarding alleged non-use, See, e.g., General Motors Corp. v. Aristide & Co., 87 USPQ.2d 1179, 1183 (TTAB 2008) ("Truncated results from search engines are entitled to little weight."), citing, In re Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ.2d 1828, 1833 (Fed Cir 2007), especially in light of Registrant's evidence of sales.¹⁰

Interestingly, Petitioner intentionally limits the appearance of its own products on the

¹⁰ Furthermore, Petitioner's search efforts do not account for geographic location, where search engines prioritize certain results over others based upon proximity to the searcher. The search engines used by Petitioner while in his local area in Texas may not have produced results for an entity such as Registrant in California.

Internet. Petitioner prohibits its customers from selling its own American Muscle products online and actively polices online sales by cutting off retailers that violate the prohibition. In addition, Petitioner only allows someone to put up a banner link exchange “[e]very now and then”. (Trillsch Depo, 30:20-33:6) Despite Petitioner’s argument to the contrary, sales or advertising on the Internet is not a pre-requisite to finding use of a mark in commerce.

D. Registrant’s Discovery Responses Are Deemed Sufficient

Registrant anticipates an argument by Petitioner that an adverse inference should be drawn against Registrant because he did not produce a complete set of invoices or any shipping records. A party that believes responses to its discovery requests are incomplete or inadequate cannot later complain about the sufficiency of the responses if it fails to file a motion challenging the sufficiency of the responses. TBMP § 523.04

Petitioner never brought a motion challenging the sufficiency of Registrant’s discovery responses or seeking to compel further responses. Because of this failure by Petitioner, Petitioner cannot now argue for any form of adverse inference against Registrant based upon a failure to produce additional invoices or shipping records. *See, e.g., Seligman & Latz, Inc. v. Merit Mercantile Corp.*, 222 USPQ 720, 723 (TTAB 1984) (Board will not impose sanction of drawing adverse inferences against party based on sufficiency of discovery responses without motion to compel complete responses and violation of an order compelling answers).

E. Registrant Has Presented The Preponderance Of The Evidence

In the present case, Petitioner has failed to show non-use of the AMERICAN MUSCLE mark for three consecutive years. Petitioner has not otherwise met its burden of showing abandonment, i.e., that Registrant stopped using and had no intent to resume use of the

AMERICAN MUSCLE mark. In contrast, Registrant has produced evidence of on-going and continuous use of his AMERICAN MUSCLE mark without any periods of non-use.

Registrant has produced invoices detailing every sale of products bearing the AMERICAN MUSCLE mark covering 2006 through the present. Registrant has also produced invoices representative of sales of products bearing the mark in 1997 and 1998, as well as advertising records covering most of the 1990s. Furthermore, Registrant's testimony sets forth clearly and unequivocally that he has continuously sold goods bearing the AMERICAN MUSCLE mark from the first use in 1987 to the present. While acknowledging some negative publicity in the late 1990s that significantly impacted Registrant's business, Registrant's evidence shows that he has maintained sales in the ordinary course of trade. Indeed, Registrant has presented the greater preponderance of the evidence regarding his continuous and on-going use.

Other than attacking Registrant's evidence, Petitioner has provided no argument or produced no evidence on the issue of non-use other than the testimony of Mr. Trillisch regarding his "several hours" of Internet searching. Such cannot carry Petitioner's burden of persuasion to prove abandonment of the AMERICAN MUSCLE mark by a preponderance of the evidence.

Registrant's use of AMERICAN MUSCLE as a trademark began in 1987 and has continued uninterrupted to the present. There has been no abandonment or intent to abandon the AMERICAN MUSCLE mark by Registrant.

6. CONCLUSION

Petitioner has not shown by a preponderance of the evidence that United States Trademark Registration No. 1,962,898 should be cancelled due to abandonment under 15 USC §1127. Petitioner should not prevail on the Petition for Cancellation.

WHEREFORE, Registrant respectfully prays to the Trademark Trial and Appeal Board that Cancellation No. 92055426 be dismissed with prejudice.

Dated: September 19, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of "Registrant's Trial Brief Redacted" to be served on this date via U.S. first-class mail, postage prepaid, upon counsel for Petitioner, as follows:

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Dated: September 20, 2013



Rachael Daniel